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Supreme Court of the United States

October Term, 1952
No. 576

UNITED STATES OF AMERICA, ex rel.
NEREO DOLENZ,

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director, New York, Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Proceedings Below

This is a petition for review on Writ of Certiorari of a decision of the United States Court of Appeals for the Second Circuit made on the 5th day of December, 1952.

The petitioner entered the United States on October 21, 1949, at Port Everglades, Florida, as a member of the crew of the Yugoslavian vessel "Hvratska". On February 28, 1951, the petitioner was arrested by an officer of the Immigration Service on a warrant charging that he was subject to deportation as an immigration not in possession of a valid immigration visa, as required by law. He has been detained ever since.

On April 5, 1951, petitioner was given a hearing before a Hearing Officer on the question of his deportability. In the course of that hearing, the appellant voluntarily revealed that at the age of sixteen, he had become a member of the Communist Party in Yugoslavia. An additional charge was lodged against the alien: that he was subject to deportation on the ground that he was a member of

the Communist Party of Yugoslavia. The Hearing Officer decided that the alien was deportable. The alien filed exceptions to the decision of the Hearing Officer and the record was forwarded to the Commissioner of Immigration and Naturalization for review. The Commissioner sustained the decision of the Hearing Officer and the alien was ordered deported on the grounds charged. The petitioner appealed to the Board of Immigration Appeals and on July 11, 1951, the Board of Immigration Appeals dismissed the said appeal.

All proceedings in the court of original jurisdiction were instituted in the United States District Court for the Southern District of New York.

On October 23, 1951, after eight months of detention, the relator sued out a writ of habeas corpus for the purpose of seeking his liberty on bond. The writ was dismissed by order of Judge Irving R. Kaufman, District Court Judge, on November 9, 1951.

It is to be noted that up to this point in the proceedings, petitioner was not represented by counsel.

The petitioner learned in December that he was about to be deported to Yugoslavia.

On December 18, 1951, the relator sued out, through his present attorneys, another writ of habeas corpus. It was alleged that the proposed deportation of the relator to Yugoslavia was in violation of the Eighth Amendment of the Constitution, in that it inflicted upon relator cruel and inhuman punishment, and on the further ground that the said deportation would be violative of 8 U. S. C. 156, in that the alien would be subject to physical persecution if deported to Yugoslavia. By stipulation between the attorneys for the Government and the attorneys for the relator, this writ was withdrawn and the deportation of relator was stayed to afford him the opportunity to make application for relief from deportation to Yugoslavia upon

the grounds that such deportation would subject him to physical persecution. This application was made.

On February 21, 1952, the relator was given the opportunity to present evidence in support of his claim that he would be physically persecuted before an investigations officer of the Immigration Department. At that time, the relator and one witness for the relator testified. A deposition of a second witness for the relator was submitted. No witnesses were called by the Government. The Government failed to adduce any evidence.

On the record made at this purported hearing, the investigation officer prepared an "Investigator's Report" in which it was recommended that the Attorney General make a finding that the alien would not be subject to physical persecution in Yugoslavia. This was done without the knowledge of or notice to the alien. On May 21, 1952, Argyle R. Mackay, Commissioner of Immigration, as delegate of the Attorney General, made an order. He stated: "I do not find that if this alien is deported to Yugoslavia, he would be subjected to physical persecution."

The right to appeal from this order to the Board of Immigration Appeals was demanded and the Commissioner refused to allow said administrative appeal.

On June 9, 1952, the instant writ of habeas corpus, which is the subject matter of this controversy, was sued out by relator's attorneys. On July 23, 1952, Honorable David N. Edelstein, District Judge, dismissed the writ but stayed the deportation of the relator pending an application to the Court of Appeals for a stay of deportation pending appeal. Petitioner appealed to the Court of Appeals. An administrative stay was granted pending the decision of the Court of Appeals on such application. Said Court, on October 7, 1952, granted a stay of deportation pending appeal.

The appeal was argued before the Court of Appeals on November 13, 1952, and affirmed by a divided Bench on December 5, 1952. The prevailing opinion was written by Honorable Harrie B. Chase, Circuit Judge, with Honorable August N. Hand, Circuit Judge, concurring. Hon. Charles E. Clark, dissented, in a written opinion.

Statement of the Matter Involved

8 U. S. C. 156 subd. (a) in part provides:

> "No alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find such alien would be subject to physical persecution."

The questions presented by the case are whether or not the petitioner, granted a purported hearing for the purpose of determining if petitioner would be physically persecuted if deported to Yugoslavia in accordance with the foregoing law, was accorded constitutional due process and whether, in view of all of the circumstances, the Attorney General's decision "that no finding that the appellant would be physically persecuted should be made" (See prevailing opinion of Chase, C. J. in the Court below), was capricious and arbitrary.

Assuming that the Administrative Procedure Act does not apply to Immigration hearings, nevertheless, petitioner was denied a hearing on this question of physical persecution as provided by the rules and regulations of the Immigration and Naturalization service (8 C. F. R. 151 et seq.). Although petitioner was allowed to submit his proofs, a hearing officer did not preside. Instead, the testimony was heard by an investigator of the Service. Thus findings of fact and conclusions of law were not made, which if adverse, would allow the filing of exceptions and an appeal to the Board of Immigration Appeals

as provided by the regulations. It should be noted that the alien's proofs stand uncontradicted on the record.

This investigator, following this purported hearing, submitted a report to the Commissioner of Immigration. Petitioner was not notified of the contents or nature of this report and did not learn of its existence until after the writ here was obtained. Thereafter the Commissioner of Immigration issued an order, as follows:

> "Pursuant to the requirements of Section 20 of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, Public Law 831, 81st Congress, after review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subjected to physical persecution."

Upon the order and nothing more the fate of petitioner rests. Negative in form, it violates every tenet of administrative procedure. No findings of fact or law were made, neither were any conclusions of fact or law made. To this day, no reason has been advanced by the Commissioner for the decision which he rendered.

Yet District Judge Edelstein in the lower court and two judges in the Court of Appeals (Chase and Augustus Hand) are of the opinion that the Attorney General's procedure used in dispatching the young man's life and fate to the totalitarian hands of Tito's Yugoslavia is proper and correct and that the act of the Attorney General in deporting this youth to Yugoslavia is not capricious and arbitrary.

Contrary to these judicial utterances, is the expression of Circuit Judge Clark, whose dissenting opinion appears in the appendix. We agree with his conclusion. We also agree with his reasoning but are of the opinion that additional basic grounds lie for the reversal of the order of the Court below. These will be set forth in our brief.

These questions were passed upon for the first time by an appellate court in this case. In three other reported district court cases, the decisions of the Attorney General were set aside and the aliens granted relief (*United States ex rel Chin Ping Zee* v. *Shaugnessy,* 107 F. Supp. 607; *United States ex rel Watts* v. *Shaughnessy* 107 F. Supp. 613; *Sang Hyup Park* v. *Barber.* 107 F. Supp. 603 id. 605). If the decision of the Court below is permitted to stand it seems inevitable that the other cases will be reversed (The government has filed appeals in the other cases).

Jurisdiction

The order of the Court of Appeals for the Second Circuit was made and entered on the 5th day of December, 1952. The jurisdiction of this Court invoked under Section 1254 (1) of Title 28, U. S. C. and Section 5 (b) of Rule 38 of the Revised Rules of this Court, as amended.

Questions Presented

The questions arising herein have resulted in wide Judicial divergence. There is a dissenting opinion in the case at hand and three District Judges have followed a line different from the prevailing opinion.

The questions here are as follows:

(1) Was the procedure, followed by the Immigration Service, in determining the question of physical persecution, in accordance with the Constitution as regards the due process which is to be accorded an alien? Specifically speaking, was the petitioner denied a proper hearing? Were his rights to appeal, in accordance with Law, denied? Could the Commissioner make a decision after the "hear-

ing" without findings of fact and conclusions of law to support the decision? And was the "finding" of the Commissioner based upon substantial evidence?

(2) In a case such as this, where the Government fails to present any evidence, and the only evidence adduced is that of the petitioner, where there is no administrative hearing in accordance with Law, where there are no findings of fact and conclusions of law, where there is no expression of the evidence upon which the decision was reached, and where the decision is negative in form, is a decision of the Commissioner under such circumstances capricious and arbitrary?

The Courts below have answered all these questions contrary to the contentions of the petitioner, the dissenting opinion of Justice Clark and several District Judges.

Reasons Why Certiorari Should Be Granted

The fates of many men will be determined by the outcome of this case. There are cases which may be outwardly more appealing to those who sit in judgment, such as the case of those Chinese who were at all times opposed to the Communist Chinese regime (*United States ex rel. Chen Ping Zee* v. *Shaughnessy, supra*) or the case of the anti-Franco Spaniard (*United States ex rel. Watts* v. *Shaughnessy, supra*) or the case of the anti-Rhee Korean (*Sang Hyup Park* v. *Barber, supra*). Again, it may be the Pole whose burning hatred for Communism is so great that his return to Poland can only result in bodily, physical harm. It may also be the Yugoslav (two of whom, in addition to young Dolenz, the attorneys here are now representing in other cases) whose deportation to the country of his birth means liquidation.

We are constrained to make this point only because we must face the reality of the deepseated hatred which even learned men have to anything which has been tainted by Communism. Petitioner here was a Communist from the age of 16 to the age of 20 and must face the actuality that this imponderable may have prejudiced his rights in the Courts below. We said in the Court below that the cry of "Communism" today makes brave men less brave.

A reading of the investigator's report to the Commissioner, as well as the statement of facts contained in the prevailing opinion below gives the distinct impression of an innate desire of those responsible for these expressions to tar the petitioner with the brush of "Communism".

Those who drafted these papers abhor Communism. Yet, we maintain that the Courts below have perpetrated a grave injustice in sustaining the directive of the Immagration Service in this case. The grave danger of this decision is sharpened when viewed in the perspective of all the other similar cases where the aliens are not and never were Communists. Thus viewed, the rule that due process is to be afforded to all, regardless of our prejudices, is demonstrated.

Petitioner knows that a review of his case before this tribunal will be just, detached, objective and humane and removed from the stresses of today, which unfortunately mar the reason of men of rectitude. We respectfully submit that the foregoing circumstances alone are worthy of this Court's consideration in determining if certiorari should be granted.

That the fear of physical persecution is something real, something that causes these aliens to resist return to the countries of their origin, even at the cost of their lives, is graphically illustrated by the cases of 22 year old Sweta Kojic, also known as Lewkovich (Administra-

tion file #0302-3873), and Luka Sarich (Administrative file #0300-308269), both of whom were represented by the petitioner's present attorneys. Both were ordered deported to Yugoslavia. Kojic slashed his wrists on the eve of his departure. Sarich went on a hunger strike. Negotiations with the Canadian and Italian authorities resulted in Kojic being accepted by Canada and Sarich by Italy. Both gratefully departed.

That all the aliens whose lives are in jeopardy in these cases are little men (in the sense that they are not diplomats or figures of note) does not mean that they do not suffer at the hands of any form of totalitarianism when they reject such ideologies. The peasant who openly decries the yoke of Communism in his village suffers physical persecution as much as the Catholic prelate who openly and articulately attacks Communism and thus gains a world wide audience. The one difference is that the world observes the tortures of the prelate and the peasant conveniently disappears. Within the purport of this law, there is and should not be any question of degree of the statute of the person affected. There is but one question,—Will he be physically persecuted?

We submit that where the law provides for a means of saving aliens from physical persecution as a result of deportation, the Attorney General wherever possible should find that such relief is warranted. We say that petitioner's case is one of those cases.

We further submit that there is not one case known to us in which the Attorney General has favorably found for an alien in one of these so-called "physical persecution" cases. In the absence of a favorable finding, we submit it may be inferred that the Attorney General studiously disregards due process in the interest of establishing policy. The lack of any evidence of deliberation in his decision supports this belief.

The same formula has been followed in each case. In each case there has been the usual negative recital. In each case there have been no findings of fact or conclusions of law. In each case, appeals to the Board of Immagration Appeals have been denied.

Circuit Judge Clark, in dissenting, said in this case:

> "The requirement of a definite finding for certain action implies deliberation and quasi-judicial adjudication, rather than mere refusal to think or act; rationally it suggests that contrary action should be based on a contrary finding. This logical conclusion is here strengthened by the obvious Congressional intent to ameliorate the potentially tragic consequences which may attend deportation to certain countries. The construction claimed by the government makes a cruel hoax of the announced relief. The Attorney-General or his representatives may sit back and do nothing; they need not give even the consideration necessary to say, "We are not convinced"—and the statutory provision becomes nugatory."

He went on to review the proofs in this case and called them "persuasive". He had this to say:

> "I suggest that reading this record—containing nothing to challenge the alien's contention—hardly any of us would doubt the fate awaiting this renegade Communist if returned to the Communist country where he had joined the part as a boy."

Circuit Judge Clark is not alone. As he pointed out in his opinion, several District Judges are in agreement with him. He refers to the *Zee, Watts* and *Parks* cases cited above.

The Board of Immigration Appeals has had the following to say about these cases:

> "The regulations are silent as to the procedure by which this issue is to be adjudicated, probably because in the great majority of cases the question never arises. Because of expedience, at the initial hearing no provision is made in the regulations for raising or litigating this issue. As a matter of practicability, this may be an advisable procedure. However, expediency cannot deny to an alien a right which the statute gives him. If the Enforcement officers in this case eventually should select Greece as the country to which the alien is to be deported (after it has established that his deportation to Poland cannot be effected because that country will not accept him into its territory), then and at that time the alien has a right, if he so elects, to file an exception to the warrant directing deportation to Greece, and has a right to be heard on the issue of whether if deported to that country he would be subjected to physical persecution. Such hearing must be conducted with all safeguards attending an administrative hearing in a deportation proceeding. An appeal eventually lies to this Board on this issue" (Administrative File #7476356).

And finally we urge as a reason why certiorari should be granted the anomaly which is created between the existing decision in this case (the result of what we believe to be policy making by the Immigration Service) and the policy of the State Department in dealing with prisoners of war in the Korean struggle. If the law, 8 U. S. C. 156, subd. (a) were nonexistent, the claim of asylum, which is the basis of this law, might be highly questionable. But where Congress has evidenced its desire to return to a principle

which in the earlier years of our Republic graced our country by its enlightened acceptance to its bosom of aliens fleeing from persecution, our judiciary should not permit that principle to be debauched as it has been in the instant case.

WHEREFORE, it is respectfully submitted that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

New York City, December 31, 1952.

Respectfully submitted,

FEINGOLD & FALUSSY,

By ALOYSIUS C. FALUSSY,
Counsel for Petitioner.

Supreme Court of the United States

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No.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

By the rules, a stay of deportation is granted provided the petition for certiarari be made within thirty days of the filing of the opinion of the Court of Appeals.

Thus pressed for time, in the course of setting forth our legal arguments, we will mention facts not recited in our petition but which, nevertheless, are part of the record below. This will be done in order to sustain the continuity of our reasoning.

The assignment of errors appear from the headnotes and sub-headnotes of our points.

POINT I

The courts below erred in holding that the Immigration Service in determining the question of physical persecution accorded petitioner due process.

An alien within the United States who did not enter the country clandestinely is entitled to due process in a deportation proceeding (*Wong Yung Sung* v. *McGrath,* 339 U. S. 33, 49; Japanese Immigrant Case, 189 U. S. 86, 104; *United States ex rel Mezei* v. *Shaughnessy,* 195 F. (2d) 964, 967).

Dolenz entered legally on October 21, 1949 and has been here since (from February 28, 1951 on Ellis Island). Therefore, under the doctrine of the *Sung* case, he is entitled to the safeguards of procedural due process.

Petitioner contends that he was denied due process as to the manner in which the question of physical persecution was determined for the reasons which follow.

(A)

Relator was denied a proper administrative hearing and the right to an administrative appeal.

An investigator conducted the "hearing" in this case. His report evidences his bias. He made no findings of fact or conclusions of law such as an examiner would have made. He had neither the independence nor tenure granted by the Administrative Procedure Act "as to give the assurances of neutrality which Congress thought would guarantee impartiality of the administrative process" (*Wong Yung Sung* v. *McGrath, supra*).

The investigator was both prosecutor and judge.

We submit that the petitioner was entitled to a hearing before a hearing officer who would have impartially

tried the question of physical persecution. We further submit that if such officer's decision had been unfavorable, petitioner had open to him the administrative appeals which were denied him in the instant case.

The prevailing opinion in the Court below took the position that inasmuch as Congress passed 8 U. S. C. 155 (a), compliance with the *Wong Yung Sung* decision no longer was required by the Immigration Service, as to sections 1004, 1006 and 1007 of the Administrative Procedure Act, 5 U. S. C. 1001 et seq. It was further said that in this phase of deportation Congress had not prescribed "any procedure to be followed by the Attorney General in performing this duty" and that therefore judicial review is "limited to whether the procedure was essentially fair."

We reject the reasoning of the prevailing opinion for a number of reasons. If our main thesis is wrong, we submit that the minimum due process required in this case was that which the court below accepted as its guide—the conduct of deportation proceedings in conformance with due process, less compliance with the excepted sections of the Administrative Procedure Act.

Due process even in accordance with this construction would require adherence to the usual practices and procedures promulgated in 8 C. F. R. 151 et seq., and not a departure therefrom, as indicated by the said opinion below. As the Board of Immigration Appeals has said he "has a right to be heard on the issue of whether, if deported to that country, he would be subjected to physical persecution. Such hearing must be conducted with all safeguards, attending an administrative hearing in a deportation proceeding. An appeal eventually lies to this board in this issue" (Administrative Case #7476356—decided March 13, 1952).

The court below failed to distinguish between an administrative hearing in a deportation proceeding and an administrative proceeding in accordance with the Administrative Procedure Act. We reiterate—petitioner was entitled to at least a deportation hearing. It would seem that the Court below stretched its point too far when it offered the failure of Congress to provide a specific procedure for this type of case as a ground for holding that petitioner was not entitled to any hearing at all.

Much is to be said for the contention of the petitioner below that he was entitled to a hearing with all the safeguards of the Administrative Procedure Act. Though sections 1004, 1006 and 1007 of the Administrative Procedure Act were excepted from deportation proceedings, section 1009 remained inviolate. Thus, a court could hold unlawful a decision of the Immigration Service which was arbitrary and capricious, contrary to constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, unsupported by substantial evidence or unwarranted by the facts (*Compare Price* v. *Commissioner of Immigration and Naturalization,* 6th Circuit, 185 F. (2d) 578, followed in *Birns* v. *Commissioner of Immigration and Naturalization* 103 F. Supp. 180 and *Barber* v. *Yanish* 196 F. (2d) 53. See also *McGrath* v. *Kristensen,* 340 U. S. 162, 169).

Petitioner was entitled to be heard before the tribunals created by law for the disposition of deportation matters. He was denied due process when the Attorney General unlawfully created his own devices to accomplish his policy of denial of asylum to those who face physical persecution through deportation.

(B)

Assuming arguendo that the so-called hearing was proper, the failure of the Commissioner to support his decision by proper findings of fact and conclusions of law was a denial of due process.

The law, 8 U. S. C. 156, subd. (a) required that the Attorney General "shall find" concerning the question of persecution. These words have been invested with a special legal significance in administrative law cases in all our Federal Courts. This court has recently enumerated what it calls "a simple but fundamental rule of administrative law" that "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

> *Sec.* v. *Chenery,* 318 U. S. 80, Sup. Ct. 454, 462 (1943).

Congress has also put its stamp of approval on the requirement that the administrative officer adequately reveal the basis of his actions. Section 8-B of the Administrative Procedure Act provides:

> "The records shall show the ruling upon each such finding, conclusion or exception presented. All decisions (including initial, recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor upon all the material, issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof" (5 U. S. C. 1007).

When we match what was done in this case against the above minimum standard of fairness laid down by this Court and Congress, the inadequacy of the Government's action is thrown into sharp relief.

The "finding" required by the statute is sought to be satisfied by a one line order signed by Argyle R. Mackay, Commissioner of Immigration, that:

> "Pursuant to the requirements of Section 20 of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, Public Law 831, 81st Congress, after review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subject to physical persecution."

The inadequacy of the Commissioner's report is pointed up by a consideration of a distinction recognized many times by this court, between "ultimate" facts and "basic" facts. The findings which statutes usually require are findings of ultimate fact, such as the requirement here that the Attorney General find that an alien would or would not be physically persecuted if deported to Country X. In all common sense and fairness, there must also be a finding of the basic facts relied on to support such an assertion.

This court's language in *U. S.* v. *Pierce Auto Lines,* 327 U. S. at 533, 66 Supreme Court 696 is representative:

> "* * * such an ultimate finding [that an applicant for a motor carrier certificate was fit, willing and able to perform the service proposed] was not enough * * * in the absence of a basis finding to support it * * *"

In another case, this court declared:

> "We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest."
>
> *Colorado-Wyoming Gas Co.* 1. F. P. C., 342 U. S. 626, 634, 65 Sup. Ct. 850, 854 (1945);

Morgan v. *U. S.*, 298 U. S. 468, 480, 56 Sup. Ct. 906, 911 (1936).

The finding here was "carefully negative in form" and "the precise language" was "used with obvious circumspection". (See Clark, *C. J.* dissenting opinion in Appendix.) Its inadequacy should be apparent. It becomes more strikingly inadequate when one attempts to follow the obscure and crabbed language of the prevailing opinion below:

> "The Attorney General decided that no finding that the appellant would be physically persecuted should be made."

Again,

> "No particular findings were required to support the decision not to make the finding which alone would have excluded Yugoslavia from the category of countries to which the Attorney General could in his direction direct the deportation of appellant."

These Alice-in-Wonderland judicial expressions might be hilarious if the tragedy which faces the petitioner were not so real.

It would seem that where, as here, a life may be liquidated by a decision made by an administrative official of a democratic government, reasons should be ascribed for such action. Any decision lacking such reasons and any such decision patently negating deliberation is a direct attack upon the constitutional rights of the person affected by such decision. The petitioner here was so affected.

(C)

The record is devoid of the slightest evidence to support the decision. In the absence of substantial evidence to support the "finding", petitioner was denied due process.

This Court declared in the leading case of *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, 59 Sup. Ct. 206, 217 (1938):

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support conclusion."

The following year, in *N. L. R. B.* v. *Columbian Enameling Stamping Co.*, 306 U. S. 292, 300, 59 Sup. Ct. 501, 501, this Court amplified its statement:

> "Substantial evidence * * * must do more than create a suspension of the existence of the fact to be established * * *. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict within the conclusion sought to be drawn from it as one of fact for the jury."

A learned commentator in a recent work has said that "the substantial evidence rule now dominates nearly all judicial review of administrative action in the Federal Courts."

> *Davis on Administrative Law, West Publishing Co.* 1951, page 868.

Congress in the Administrative Procedures Act also adopted the substantial evidence rule, *U. S. Code, Title 5, Sec. 1009 (e) (5).*

When we search this record, we find that there is not only no substantial evidence to support the finding of the

Commissioner but that there is absolutely no evidence at all to support it. The Government presented no witnesses, documents or facts to support its position. In this state of the record, it is impossible to reconcile the finding of the Commissioner with any standard of fairness whether that laid down by the Court, by the Congress or by ordinary common sense. Especially in the Immigration Service where decisions involve the rights of personal liberty rather than mere property rights, it would seem that the basic minimums required of agencies which deal only with property rights should at least be observed. If substantial evidence is required to support a rate fixing by the Interstate Commerce Commission or the denial of a license by the Federal Trade Commission should less be required for the making of a decision which could possibly involve the taking of a man's life?

It was argued in the Court below by the Government that "it is pertinent to inquire at this point how the Government would go about proving that this alien or any alien would not be subjected to persecution in a foreign country." This argument prefaced the Government's contention that petitioner's proofs did "not compel the inference which he (the petitioner) demanded the petitioner to draw".

Petitioner's "persuasive case" (see Clark, *C. J.* dissenting opinion), was supported by expert testimony. Such testimony is sufficient to support an administrative decision. (*Bristol-Myers Co.* v. *Federal Trade Commission,* 185 F. (2d) 56, 62; *United States* v. *Montgomery Ward & Co.,* 150 F. (2d) 369, 380.)

Yet, the Government made no effort to meet petitioner's evidence through the vast facilities available to it. State Department specialists on Yugoslavian matters were not called to disprove the testimony of petitioner's experts. That the Government failed to do this compels the inference that what was proven by petitioner's experts was

incapable of contradiction. Witnesses named by Dolenz were available to the Service for questioning. If Dolenz had been guilty of lying, the Service could have pilloried him by conducting an investigation. This was not done.

United States ex rel. Tisi v. *Tod,* 264 U. S. 131, relied upon by the Court below is not authority for the proposition that the Attorney General may arbitrarily rule, in the absence of substantial evidence to support such ruling. It merely holds that where the record discloses "evidence of other facts" from which inferences might have been drawn unfavorable to the alien, even though no evidence be introduced by the Government to the contrary, he is "not obliged to believe this testimony".

But that was not the case here. No unfavorable inference could have been drawn from the facts which stand uncontradicted on this record.

In the absence of substantial evidence to support the Commissioner's decision, due process was denied petitioner.

POINT II

The "finding" of the Commissioner was arbitrary and capricious.

> "In a matter left specifically by Congress to the determination of an administrative body * * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing * * * and an application of the statute in a just and reasoned manner."
>
> *Gray* v. *Powell,* 314 U. S. 402, 411, 62 Supp. Ct. 326, 332 (1941).

The above rule could very well be said to represent an extreme in judicial self-effacement. It most certainly estab-

lishes a bare minimum procedural requirement beyond which even the most harried and overworked officer cannot go. Especially in matters such as this where a human life is at stake, any departure from that minimum standard of procedure should not be tolerated. Any departure from that standard must be tagged arbitrary and capricious and cannot stand.

Here we have a purported finding of ultimate fact made by an administrative officer pursuant to command of a statute. We look in vain at this record for one iota of evidence upon which the Commissioner may be said to have based his opinion.

In the so-called "finding" itself, no reference to any particular fact is made, the Commissioner merely stating that he finds the way he does "after review of the facts in this case".

The "facts in this case" can only refer to the evidence presented by the alien and his witnesses at the so-called "investigation" and to the investigator's report based on that evidence.

The appellant testified that he had been beaten up twice by the Yugoslavian Secret Police. He testified that he had seen an officer in the Yugoslavian Army executed by firing squad for expressing a desire to desert the Communist Party.

Bogdan Roditsa, a witness for the appellant, testified that he had been Chief of the Foreign Press Department of the present Yugoslavian Government and that he was a professor of modern European history and had written articles on the subject of the Communists in the Balkans and especially in Yugoslavia under Tito. After qualifying as an expert on the Yugoslavian internal situation, the witness testified, in answer to hypothetical questions which posed the situation of the appellant that in his opinion the

appellant would be subjected to severe punishment for political reasons if he were deported to Yugoslavia.

The Dean of the Serbian Cathedral of St. Sava, the Very Reverend D. J. Shoukletovich, in an affidavit, also was of the opinion based upon his knowledge of other cases, that a person in a position of the appellant would be subjected to imprisonment or execution in Yugoslavia for having renounced his affiliations with the Communist Party of Yugoslavia.

From this testimony and the other testimony in the record, the "investigator" concluded that the alien would not be subjected to persecution in Yugoslavia and he issued his "investigator's report" to that effect. The Commissioner adopted this report and issued his finding against the alien in the words of the statute.

It is immediately apparent that the term "investigator's report" is a complete misnomer. This report more properly should have been labeled "decision". It consists merely of an apology for the conclusion reached.

In all candor, can the Government properly term this procedure a hearing? With all the sources of foreign intelligence which the Government commands, can this meagre procedure, where a man's life is at stake, be called other than arbitrary? The conclusion seems inescapable that the Government's procedure in cases involving a claim of physical persecution cannot be sustained. If the Service is proceeding on facts and information which is dehors the record, then the alien has been denied the right to meet such evidence. On the other hand, if the Commissioner's decision is in truth based merely on the record made here, then there is no escape from the conclusion that his decision was arbitrary and capricious.

This conclusion has been reached by several distinguished judges of the District Courts who have been called

upon to review the action of the Commissioner in these cases. (*Sang Hyup Park* v. *Barber* (*supra*); *United States ex rel. Watts* v. *Shaughnessy, supra; United States ex rel. Chen Ping Zee* v. *Shaughnessy, supra.*)

Conclusion

Justice Douglas of this Court in "Being an American" (1948) The John Day Company, said:

> "Procedure is more than formality. Procedure is, indeed, the great mainstay of substantive rights. If acusation and proof were easy, if the right to counsel were denied, if proof were not subjected to close scrutiny, if the accused, rather than the prosecution, carried the burden, then racial, religious, or political prosecutions could easily become the order of the day."

A writ of certiorari to the United States Court of Appeals for the Second Circuit should issue.

December 31, 1952.

Respectfully submitted,

ALOYSIUS C. FALUSSY,
Attorney for Petitioner.

ALFRED FEINGOLD,
of Counsel.

APPENDIX

CLARK, *Circuit Judge* (dissenting):

After the statutory provision here in issue was added to 8 U. S. C. § 156 by amendment in 1950, this court construed it to require that "before the appellant can be deported, the Attorney General • • • must find that he will not be subjected to physical persecution in the country to which he is to be sent." *U. S. ex rel. Harisiades* v. *Shaughnessy*, 2 Cir., 187 F. 2d 137, 142, affirmed *Harisiades* v. *Shaughnessy*, 342 U. S. 580. In so stating, I believe the court was making a reasonable interpretation of the statutory mandate—an interpretation also reached by several district judes.[1] The requirement of a definite finding for certain action implies deliberation and quasi-judicial adjudication, rather than mere refusal to think or act; rationally it suggests that contrary action should be based on a contrary finding. This logical conclusion is here strengthened by the obvious Congressional intent to ameliorate the potentially tragic consequences which may attend deportation to certain countries. The construction claimed by the government makes a cruel hoax of the announced relief. The Attorney-General or his representatives may sit back and do nothing; they need not give even the consideration necessary to say, "We are not convinced"—and the statutory provision becomes nugatory. In argument to us, that contention was actually made; it was said that this provision was in no way for the benefit of the deportee, but was only protection to the government officer in his performance of merely administrative and ministerial functions. But so restrictive a function seems quite inconsistent with the structure of the section (which also gives a choice to the

[1] See *Sang Hyup Park* v. *Barber*, D. C. N. D. Cal., 107 F. Supp. 603, id. 605; *United States ex rel. Chen Ping Zee* v. *Shaughnessy*, D. C. S. D. N. Y., 107 F. Supp. 607; and *United States ex rel. Watts* v. *Shaughnessy*, D. C. S. D. N. Y., 107 F. Supp. 613.

alien if he can get a country to recognize it). And to say that such an interpretation is inhumane is an understatement. The opinion herewith does not explicity adopt this rationale; but it unfortunately seems the natural deduction from my brothers' decision.

If I am correct, the finding here in question is inadequate, since it is carefully negative in form. In view of the precise language used with obvious circumspection, I do not believe it possible to read it as constituting the finding I deem necessary. Hence I would reverse without getting to the question of the amount of evidence needed or the extent of the Attorny-General's discretion in evaluating testimony. But I think some reference may be made to the showing on behalf of the alien as bearing upon the failure of the government officer to make a finding; for conceivably no finding may be necessary where no case is made for the alien. Here I am bound to say that I think a rather persuasive case is made not only by the alien's own testimony, but by that of two apparently intelligent expert witnesses—one formerly in the Tito government, now professor of modern European History in New Jersey, the other Dean of the Serbian Cathedral of St. Sava in New York City. I suggest that reading this record—containing nothing to challenge the alien's contention—hardly any of us would doubt the fate awaiting this renegade Communist if returned to the Communist country where he had joined the party as a boy.

I recognize that the area in which an alien can seek judicial relief and does not remain subject to the unreviewable and uncontrollable doom of a government official is being steadily narrowed by Congress, which has the responsibility, and that judges must obey the declarations of governmental policy made by the legislative body. But I think we ought not to rush ahead of Congressional intent. I am impressed by the wisdom of a distinguished American lawyer, who finds that courts (as well as other bodies gov-

ernmental and lay) have not been thus hesitant—in this among other crucial areas—and who gives this measured conclusion:

> "May it not well be that the greatest danger to our institutions lies not in the threats of foreigners but in our own weakness in yielding to emotion and our increasing readiness to minimize and disregard the fundamental rights of the individual? What is needed is a resurgence of the moral principles upon which our greatness was built. Thus the right to a fair hearing involves a moral principle recognized long before the adoption of the Constitution. It has become a legal right because it was first recognized as a moral right, and the age-old test remains unchanged—the test of what is fair between man and man." John Lord O'Brian, *New Encroachments on Individual Freedom,* 66 Harv. L. Rev. 1, 26, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 576

UNITED STATES OF AMERICA, EX REL. NEREO DOLENZ, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, NEW YORK DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (R. 23-30) are reported at 200 F. 2d 288. The opinion of the District Court (R. 18-20) is reported at 107 F. Supp. 611.

JURISDICTION

The judgment of the Court of Appeals was entered December 5, 1952 (R. 30-31). The petition for a writ of certiorari was filed January 29, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien who had been ordered deported upon the basis of full hearing and administrative appeal was entitled, under the Constitution or under the language of the Immigration Act then in effect, to a further hearing before a hearing officer, and an administrative appeal, with respect to an order of the Attorney General stating that he did not find that the alien would be subject to physical persecution in the country to which he was to be deported.

2. Whether the Attorney General's procedure in arriving at the aforesaid determination was capricious or arbitrary.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010):

> * * * No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution. * * * [8 U.S.C. Supp. V, 156 (a).]

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Second Circuit (R. 30-31) affirming the order of the

District Court for the Southern District of New York (R. 21) dismissing the writ of habeas corpus (R. 9) whereby petitioner sought release from custody of the District Director of Immigration and Naturalization upon the ground that the Attorney General's order, stating that he did not find that petitioner would be subjected to physical persecution in Yugoslavia, was invalid (R. 4-7).

Petitioner, a citizen of Yugoslavia and a member of the crew of a Yugoslavian vessel, deserted his ship in November 1949 and thereafter remained in the United States (R. 2, 6, 10, 40-41). He was apprehended in February 1951. A hearing with respect to his liability to deportation was held before a Hearing Officer in April 1951. At this hearing his testimony disclosed, and the Hearing Officer duly found, that petitioner was subject to deportation, not only because of illegal stay in the United States, but also because of membership in the Communist Party. Petitioner excepted to the Hearing Officer's report and the entire record was thereupon forwarded for review to the Assistant Commissioner of Immigration and Naturalization. The Assistant Commissioner ordered petitioner's deportation on the two aforesaid grounds. An appeal to the Board of Immigration Appeals was dismissed July 11, 1951, and on July 17 a warrant for deportation was issued designating Yugoslavia, if that country would accept petitioner, otherwise Italy (R. 2-3, 10-11).

Petitioner thereafter sued out three writs of

habeas corpus other than the petition here involved. The first (Civil No. 70-239) was dismissed on November 9, 1951. The second (Civil No. 72-39) was withdrawn pursuant to stipulation under an order entered January 3, 1952, and the third (Civil No. 72-37) pursuant to stipulation under an order entered January 9, 1952, the deportation being administratively stayed by the Immigration and Naturalization Service to afford petitioner opportunity to present evidence in support of his claim that he would be subjected to physical persecution in Yugoslavia (R. 3-4, 11-12, 32). The inquiry on this claim was conducted on February 21, 1952, by an investigator of the Immigration and Naturalization Service. Petitioner and his witness were accompanied at the inquiry by petitioner's counsel, and petitioner was advised, also, that he would have an additional opportunity to specify a preference as to the country to which he should be deported [1] (R. 35-36).

Petitioner testified at the inquiry substantially as follows: He was born in March 1929 at Rieka, then named Fiume (R. 47). He entered the Yugoslavian army in April 1944 to escape "the German terror in [his] home town" and served until August 1945 (R. 40, 42, 47-48). In September 1944 he heard talk of an officer who had spoken against the Communist Party and who was executed as a purported deserter (R. 48). In May 1945, peti-

[1] At the earlier deportation hearing, when asked to specify a preference as to the country to which to be deported, petitioner had failed to arrive at any suggestion (R. 11).

tioner, by then a lieutenant in the army, was called to a meeting at which the persons in attendance were told that they were members of the Communist Party; one did not request membership but was chosen. He never wanted to be a member but "they were eliminating anybody who in any manner interfered with their work" (R. 41, 42-43, 45, 48). Thereafter, he regularly attended meetings restricted to members, and when earning money he paid dues (R. 43-44). As a member of the Party, he could no longer attend the Catholic church in which he had been baptized and confirmed (R. 41-42). He could not become an Italian citizen in view of his prior service with the Yugoslav army (R. 38). In August 1945, petitioner was sent to serve in the Ozna, a secret police organization of the army, in which he stayed for two months and then obtained release, after extensive questioning as to his intentions and some threats, in order to enter a school to become a ship-building engineer (R. 38, 43, 45).

From February to June 1946 petitioner served, pursuant to appointment by the Party, as secretary of a youth group of 13 or 14 members, principally in the distribution of party literature (R. 44-45, 47). In the same year, he decided to leave Yugoslavia and therefore he continued at the Merchant Marine Academy rather than with ordinary schooling (R. 45-46). His parents had separated in 1945 and he and his brother and sister lived with his mother. His sister, who was the only one work-

ing, died in May 1947, and petitioner then did clerical work for a month for an anti-fascist committee consisting of members of the Communist Party (R. 46-47).

In June 1948 petitioner was beaten up for being in a group that was singing songs deemed anti-Tito by the secret police (R. 39). In 1949, he worked for the secret police against Russian agents (the length of time not stated) and was beaten up by the Communist Party in ignorance of his actual connections with the secret police (R. 39). In May 1949 he was suspended by the party for 43 days (the cause not stated) (R. 39).

Prior to the trip to the United States, he made a trip to South America, and a trip to Australia and New Zealand, but pending the escape of his mother and brother from Yugoslavia he did not desert ship (R. 40-41). When petitioner made his trip to the United States, his mother and brother escaped to Trieste (R. 37-38), and upon arrival in New York, petitioner deserted the ship but made no other, formal severance of his connection with the Communist Party (R. 41).

Petitioner's father, with whom he was in occasional touch after the separation in 1945, was not a member of the party and, at the time of the inquiry, was a foreman in a Yugoslavian oil refinery in Rieka and apparently not molested (R. 37-38, 47, 49).

Petitioner testified, as noted *supra,* p. 4, that he had seen a Yugoslavian officer shot in 1944 be-

cause, the rumor was, he wanted to desert and had been heard to talk against the Communist Party (R. 48). Secondly, a man in his home town was a member of the Communist Party. "His ideas were contrary to the [party]. * * * One day he got three shots in the back." But the secret police apparently investigated the case and looked for the murderer (R. 48). Also, in 1947, petitioner saw a body in badly damaged condition in a mortuary chamber and a guard told petitioner " '[W]e found him on the Street, he had an accident' " (R. 49).

Petitioner presented a witness, Bogdan Raditsa, a Roman Catholic, who had left Yugoslavia in 1945 and was teaching modern European history at Fairleigh Dickinson College, Rutherford, New Jersey, and was writing on communism and the Balkans. He had also testified before the McCarran subcommittee (R. 49-52). Raditsa testified that he had never been a member of the Communist Party but had been in the Yugoslav government for three months in 1945 "as a Private" (Chief of the Foreign Press Department) and "discharged because of conditions" (R. 50, 53-54). He said that he had "made [himself] acquainted with the political situation in Yugoslavia" (R. 50) and had "heard" of punishment of Yugoslavs who had rejected communism, and that that is the "usual pattern" in communistic countries. However, he did not personally know of any specific instances (R. 51-52). Nothing had happened to his own father, mother, or sister, left behind in Yugoslavia,

but he had heard of threats to relatives (R. 52). He was not acquainted with petitioner and had no proof that petitioner had actually broken with the Communist Party (R. 51, 54). He stated, in answer to a hypothetical question, that if it were to be assumed that petitioner deserted ship "and renounced his affiliation with the Communist Party" he would be subject to severe punishment, beyond that of a person who had merely deserted (R. 51-52, 54).

Petitioner also presented the affidavit of the Dean of the Serbian Cathedral, resident in New York for the past 23 years, stating that, by reason of his "position", he was "well acquainted" with the political situation in Yugoslavia (R. 55). He stated that, on the basis of his "knowledge of other cases", if a Yugoslav, formerly active in the Communist Party were to renounce and then be forced to return, he would be punished and liquidated (R. 55-56).

Petitioner stated that his preference as to the country to which he might be deported was New Zealand, but he did not "have anybody over there" and had no reason to believe he would be accepted there (R. 37).

The investigator prepared a report of the inquiry, dated March 11, 1952, summarizing the evidence and attaching a transcript thereof (R. 32-56). He concluded that petitioner's testimony adduced no real evidence that he would be persecuted, but only rumors and incidents susceptible of various interpretations (R. 34), and that peti-

tioner's witnesses adduced no specific cases, and one witness had disclosed that his own family had not been molested (R. 34-35). The investigator accordingly recommended against any finding that petitioner would be persecuted (R. 35). The report and record were forwarded to the Commissioner of Immigration and Naturalization (R. 12) who entered an order, dated May 21, 1952, as follows (R. 31):

> Pursuant to the requirements of Section 20 of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, Public Law 831, 81st Congress, after review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subjected to pnysical persecution.

Under date of June 9, 1952, petitioner applied for the writ of habeas corpus here involved (R. 1-8) complaining that due process had been denied him in that the inquiry was held before an investigator rather than a hearing officer; that he had been denied the right of administrative appeal (R. 6, par. 20); that the order of May 21, 1952, included no findings of fact, but only a conclusion (R. 6-7, par. 21); that all applications of this nature have been denied, thus indicating arbitrary and capricious action (R. 7, par. 22); and that deportation of petitioner to Yugoslavia would be cruel and inhuman punishment, in violation of the Constitution, Amendment VIII (R. 7, pars. 23, 24).

The district judge dismissed the writ (R. 21)

and his order was affirmed by the Court of Appeals (R. 30-31). The majority opinion in the Court of Appeals (R. 23-28), after extensive review of the testimony, pointed out that the proceedings which had determined the basic fact that petitioner was to be deported had involved no lack of due process and had been accorded the full course of appeals (R. 24, 26-27); that the subsequent phase in which the country for deportation is designated does not involve a further administrative order, subject to a further review by the Attorney General, but rather a primary duty imposed by Congress directly on the Attorney General to make the designation, employing such procedure and investigation by subordinates as the Attorney General's judgment indicates and without specification of any particular procedure by Congress (R. 27). The majority further found the procedure fair, concluding that opinions of the witnesses were not required to be adopted by the Attorney General as his own, and that additional findings were not necessary (R. 27-28). Judge Clark, dissenting (R. 28-30), concluded that the negative form of the order prevented it from constituting the finding he deemed necessary, without reaching the question of the amount of evidence needed or the extent of the Attorney General's discretion. He suggested that the evidence adduced did indicate that petitioner would be subject to persecution in Yugoslavia (R. 29-30).

ARGUMENT

Petitioner contends that, despite the full hearing and administrative appeals which established his deportability, he was entitled to another formal hearing, and appeals, with respect to the Attorney General's disposition of the claim that Yugoslavia would subject petitioner to physical persecution. We submit that no such additional and extensive procedure is required as a matter of constitutional right. Nor has such a requirement been enacted by the Congress in the statute here involved, which has been supplanted by a new statute which makes clear that such procedure is not required.

1. With respect to the constitutional aspect, it must preliminarily be noted that the basic question as to whether petitioner is entitled to remain in the United States has here been decided already, in admitted conformity with all constitutional requirements (*supra,* p. 3). The alien is thus no longer "a part of our population" under any color of right, as clearly distinguished from the situation in cases relied upon by petitioner, particularly *The Japanese Immigrant Case,* 189 U.S. 86, 100-101. In the cited case the complaint as to the procedure was made with respect to the basic proceeding which would itself determine whether the alien's stay in the United States was or was not lawful—the alien was still in the United States under color of right. But as to matters dealing not with that decisive aspect, but only with the col-

lateral execution of the order of deportation, we think the law clearly settled by the recent decision in *Carlson* v. *Landon,* 342 U.S. 524. In that case, as here, the formal proceedings to determine the alien's basic right to remain in the United States were not the subject of the dispute; the dispute in *Carlson* v *Landon* was with respect to the collateral matter of the Attorney General's decision on bail pending such proceedings and was resolved by this Court in favor of the Attorney General's power to act summarily. *A fortiori,* where, as here, the basic determination of the alien's deportability has already been made, the collateral matters involved in administration of that determination are even less such matters as Congress, on constitutional grounds, must make the subject of additional and repeated formal hearings and appeals as to each step.

2. Petitioner's contention (Pet. 17) that the Congressional enactment itself has imposed the requirement of an additional formal hearing and appeal, is based upon over-emphasis of the word "find" in the phrase "any country in which the Attorney General shall find that such alien would be subjected to physical persecution." We think the legislative effect was correctly expressed in the majority opinion below (R. 27):

> * * * [Petitioner] has misconceived the function of the Attorney General in respect to this phase of the deportation proceedings. He is not a reviewing officer who supervises an order made by an administrative agency which

> has directed the country or place to which a deportable alien shall be sent. He is charged by statute with the duty, and given the primary authority, to make the direction himself. He may perform his duty through his delegate and the delegate may use such procedure, reasonably designed to ascertain the pertinent facts, as his judgment dictates, subject of course to the approval of the Attorney General. * * * Congress did not see fit to prescribe any procedure to be followed by the Attorney General in performing this duty of designation nor make provision for any particular type of review of his action. Judicial review is, consequently, limited to whether the procedure was essentially fair. *Carlson* v. *Landon,* 342 U.S. 524; see *Harisiades* v. *Shaughnessy,* 342 U.S. 580.

While the word "find" can, in an appropriate context, indicate a formal finding, especially when accompanied by specification of the formal procedure, it can also mean a determination by less extensive processes.[2] The word "find" is here placed in a section (see 8 U.S.C., Supp. V, 156 (a)) dealing exclusively with various grants of discretion to the Attorney General for dealing with the numerous essentially administrative contingencies collateral to the formal proceeding on deportability. Thus, if the country to which the alien wishes to be deported is unwilling to accept him, the Attorney

[2] Thus, the Supreme Court of Illinois remarked in *City of Chicago* v. *Atwood,* 269 Ill. 624, 627, "The words, 'found to be a nuisance,' mean found, discovered or perceived * * *".

General, "within his discretion," is to make a selection. If the United States is at war and the deportation upon the usual basis "shall be found by the Attorney General to be impracticable or inconvenient" the alien may, "at the option of the Attorney General" be deported to certain other countries. When "in the opinion of the Attorney General" the mental or physical condition of the alien requires personal care, the Attorney General may provide an attendant. Bond pending determination of deportability is at the "discretion" of the Attorney General, as is also detention after the deportation order.

No legislative history has been adduced to indicate that the words "discretion", "found", "option", and "opinion" in this section, or any of such words, were intended to invoke a full, formal hearing, with appeals, as is the case in the preceding section dealing with the basic determination of deportability. We submit, accordingly, that the word "find" is here to be interpreted under the rule of *ejusdem generis;* it is not to be interpreted by an uncalled-for reliance on the fact that it is a different word from "discretion", "option" or "opinion" and can have a different as well as similar effect. The significant consideration is that the word "find" is employed in the same section with these other words—a section dealing in its entirety with the necessarily flexible implementation of a basic determination of deportability already accorded full hearing.

Subsequent legislative history verifies the foregoing analysis. The language of several drafts of the new Immigration and Nationality Act was characterized as follows in congressional reports (H. Rep. 1365, p. 59, and S. Rep. 1137, p. 32, 82d Cong., 2d Sess.):

> The bill continues the provision in existing law to the effect that no alien shall be deported to any country in which the Attorney General finds that he would be subjected to physical persecution.

The new language thus characterized as being of the same effect as the language here in question, was as follows (H. Rep. 1365, 82d Cong., 2d Sess., p. 191):

> No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall *in his discretion* find that such alien would be subjected to physical persecution. [Italics supplied.]

The conference report of June 9, 1952 (H. Rep. 2096, 82d Cong., 2d Sess., p. 55) provided even stronger language, without any statement that it embodied any change of substance (see p. 129). This language, now embodied in the new act, is as follows (P.L. 414, 82d Cong. 2d Sess., Sec. 243(h); 66 Stat. 214):

> The Attorney General is *authorized* to withhold deportation of any alien within the United States to any country in which *in his opinion*

the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason. [Italics supplied.] [3]

3. The Attorney General's administration of the provision was in no sense arbitrary or capricious. Clearly, he was not required to adopt petitioner's self-serving declaration of fear as his own conclusion (*Tisi* v. *Tod*, 264 U.S. 131, 133), nor were the few concrete instances of violence adduced by petitioner persuasive of any general practice even if accepted at face value or as attributable to renunciation of communism (*supra*, pp. 4, 6-7).

Petitioner's two witnesses had been away from Yugoslavia for 6 and 23 years, respectively (*supra*, pp. 7-8). Their claim of familiarity with current conditions was vague and without support by concrete instances. Indeed, one witness conceded that his family, still in Yugoslavia, had remained unmolested (*supra*, pp. 7-8). Moreover, the witnesses based their opinion that there would be persecution upon a hypothesis of a renunciation of the Communist Party which does not appear in petitioner's case; his only evidence of renunciation was desertion of his ship, without any anti-Communist utterances to outsiders (*supra*, pp. 6, 8). Nor does it appear that petitioner, aged 16 to 20

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[3] Petitioner twice cites an excerpt from a Board of Immigration Appeals opinion in Administrative File No. 7, 476,-356, indicating a right to appeal in this type of determination (Pet. 11, 15). The excerpt was patently dictum and was never thereafter upheld by the Board.

during his contact with the party, was a party member of such prominence or station as would warrant particular reprisal—his highest office was apparently secretary of a youth group of 13 or 14 members (*supra*, p. 5). Nor does it follow that persecutions in Yugoslavia several years ago mean that there would be persecution for the same things today.

The extensive transcript of the inquiry (*supra*, pp. 4-9) discloses a full and unimpeded opportunity to adduce for petitioner evidence in support of his contention. We are advised by the Commissioner of Immigration and Naturalization that such transcripts, exhibits, and the reports of the investigators are carefully examined by persons assigned to this work in the Immigration and Naturalization Service, who also compare and consider any additional information adduced by or concerning the alien in the record of the deportation hearing and any additional information available or, when necessary, obtained from other governmental sources. Obviously, certain of the information and its sources cannot be disclosed. Hence the undesirability, as well as lack of necessity, of adducing of evidence by the Government at the inquiry.

It is upon the basis of the foregoing procedure, and the recommendations arrived at thereby, that such an order as that here involved is formulated. We are advised that only 36 cases of this kind have been presented thus far. The particular cases

failed to disclose any genuine instance of probable persecution. We submit that this result is not the product of any arbitrary desire to nullify the provision, as hinted by petitioner (Pet. 9), but is due, rather, to the fact that there are alternate procedures available before deportation where danger is truly involved. For example, the alien's choice of the country to which he prefers deportation can dispose of the question; the alien can choose a safe country rather than delaying in making any choice at all, as petitioner did here, apparently in hope of somehow staying in the United States. With the expertise and the will to cooperate of the Immigration and Naturalization Service in the ascertainment of proper havens for the deportees, it is no indication of caprice that the aliens who have drifted to the point of actual deportation and then claimed danger have not presented cases persuasive of a finding in accord with their claims.

The judgment as to whether an alien will be subject to persecution has properly been vested by Congress in a government official who has access to the basic information and expertise, often confidential, necessary to the making of the judgment. The judgment should be left there, in the absence of abuse.

CONCLUSION

The decision below is correct. The importance of review by this Court in the case of the statutory provision here involved is substantially eliminated by the supplanting of that provision by the new provision effective December 24, 1952 (*supra*, pp. 15-16; 66 Stat. 281-282) which unmistakably leaves the matter to the discretion of the Attorney General. For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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October Term, 1952

No. 576

UNITED STATES OF AMERICA, *ex rel.* NEREO DOLENZ,
Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director, New York District Immigration and Naturalization Service,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

The government seeks to defeat a review of this case. It is urged that "the importance of review by this Court in the case of the statutory provisions here involved is substantially eliminated by the supplanting of that provision by the new provision effective December 24, 1952, * * * which unmistakably leaves the matter to the discretion of the Attorney General". (Page 19, respondent's brief. See context 66 Stat. 281-282 pp. 15-16, respondent's brief.)

The government thus seeks to escape the impact of the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.* which would, among other things, have nullified the decision made in this administrative deportation hearing (1) for having permitted an investigator to hear the case and recommend the decision (Title 5 U. S. C. 1004 (c)); (2) for having decided the case on material dehors the record as prohibited by Title 5 U. S. C. 1006 (c); and (3) for having made a decision without including "a statement of (1)

findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record" (5 U. S. C. 1007 (b)).

We assume that the government bases its contention upon 5 U. S. C. 1009, which precludes judicial review where "agency action is by law committed to agency discretion".

But Congress did not grant, under the new law, the authority to the Attorney General to resolve in his discretion, the issues of physical persecution. A contrary legislative intent was clearly enunciated.

As pointed out at page 15 of respondent's brief: Congress at all times adhered to the proposition that "the bill continues the provision in existing law to the effect that no alien shall be deported to any country in which the Attorney General finds that he would be subjected to physical persecution".

It is difficult to follow the reasoning of the government. It stands admitted that the legislative history of this particular section evidences that while at one point a proposed draft stated that the Attorney General could make a finding as to physical persecution "in his discretion" (H. Rep. 1365, 82d Cong., 2d Sess., p. 191), the final bill deleted from the new law the words "in his discretion". For the government to now argue that the present law authorizes the Attorney General "in his discretion" to determine the question of physical persecution, is to lose sight of the plain meaning of words. If Congress had meant to vest discretionary power in the Attorney General, the words "in his discretion" could have been retained in the final law. That Congress deleted these words evidences the tenuous nature of the respondent's argument. Before the enactment of this law, Senator McCarran, whose name the bill in part bears, said:

> "(88) It is charged that the McCarran-Walter bill authorizes arbitrary deportation by the Attor-

> ney General. The truth is that the bill provides a detailed and comprehensive procedure to be applicable in deportation cases which provides that every decision in deportation cases must be based on reasonable, substantial and probative evidence. The bill further preserved the right of judicial review of the decision of the Attorney General in deportation cases under the procedure prescribed."

(Page "6" of "Factual Resume" from the Office of Pat McCarran (D-Nev.), McCarran-Walter Omnibus Immigration and Nationality Bill (S. 2550) v. Humphrey-Lehman Substitute.)

The Conference Report, Statement of the Managers on the Part of the House (U. S. Code, Cong. Service, 82nd Cong., 2nd Sess. p. 2854) had this to say:

> "In order to further clarify legislative intentions, the conferees have agreed to express in their respective statements certain of their unanimously held opinions, trusting that such statements will facilitate the task of the executive agencies charged with the administration of the proposed law. * * *
>
> "(2) Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings."

We respectively submit that from the foregoing, petitioner's attack upon the old law is equally applicable to the new law.

Even if we assume that a judicial review of the question of physical persecution were barred under the new law by Section 1009, the denial of the right of a proper hearing and a proper decision in accordance with the Administrative Procedure Act, would constitute a denial of due process.

And in the final analysis, new law or old law—if discretion be abused, it is always a matter of judicial review.

II

The government for the first time now admits that in 36 cases of this kind, the Commissioner of Immigration has made negative findings similar to the one made here. We need not labor the point that if the burden of proving a negative is to be placed upon a person claiming physical persecution, the purpose of both the old and new laws is emasculated. The danger of permitting the head of an administrative agency to evade the making of an affirmative finding by reliance on negative findings is to cloak such administrators with a power so great as to destroy democratic process.

The attempt to arrogate plenary and summary powers to themselves by agency heads and the resultant chaos which might ensue is best illustrated by comparison of the action of the Commissioner in this case with that of the Federal Security Administrator in *Atlas Powder Company* v. *Ewing* (not reported. Petition for certiorari is now pending in this Court #610, October Term, 1952). There it was found "the results of the pharmacological tests reported do not warrant the conclusion that there is no likelihood of injury from bread containing these substances". On the strength of this negative finding, the petitioner's product in that case was eliminated from a market which it had enjoyed for years.

Thus two widely divergent Administrative agencies make use of the negative finding. To allow this state of illegality to remain unchallenged is to set the pattern for all other agencies. Lacking the courage to find affirmatively, the negative finding is utilized and the design for the abuse of discretion is fixed.

III

The respondent's reliance on *Carlson* v. *Landon,* 342 U. S. 524, is without basis. We do not believe that at this time we should burden the Court with a discussion setting forth our reasons for urging that the *Carlson* case is not applicable to case at bar. We now only state that while the question of bail may be collateral to a finding of deportability, the question of whether an alien may be ordered deported to a country other than the one which will accept him and which he chooses or to a country where it stands proven the alien will be physically persecuted goes to the very heart of a determination of deportability.

IV

The acting Solicitor General is to be commended upon his display of candor and forthrightness. This petitioner and an assortment of 36 aliens now know how the orders were formulated which will dispatch them to liquidation, torture and brutality. Though their bodies bleed and their lives be snuffed out, they can now face their ordeal consoled by the knowledge that the Commissioner of Immigration found against their plea of physical persecution on "information" the "sources (of which) cannot be disclosed" (p. 17, respondent's brief).

This shocking disclosure of star chamber trial is made more stark by the attempt of the government to justify this unAmerican procedure on the grounds that there are "only 36 cases of this kind". Must the blood of our deportees

pour into the oceans and stain our shores before we shall be made to realize that the adoption of totalitarian secret police methods will cause our own destruction?

No claim is made that the national security is threatened by the presence of this petitioner or the other 35 deportees. However, it is insinuated. In *Knauff* v. *Shaughnessy,* 338 U. S. 537, the Commissioner of Immigration charged that Mrs. Knauff was excluded as a security risk on information of a confidential nature, a disclosure of the sources of which would endanger the national security. Counsel here represented Mrs. Knauff in her administrative proceeding. After the decision by this Court, a hearing was granted to her by the then Attorney-General. We have experienced the effect of light being cast into the secret files of the service. The weight which should be given the "information" upon which the Immigration Service bases its decisions in these so-called security cases is best illustrated by a reading of the decision of the Board of Immigration Appeals in ordering the admission of Mrs. Knauff to this country (Administrative File #A-6937471). The veil of secrecy in the *Knauff* case when cast aside revealed "information" consisting wholly of hearsay.

The problem of the *Knauff* case seems trivial when compared with those of the 36 now facing "physical persecution". If they were deported and, upon arrival in their destined country, immediately liquidated, their trials and tribulation would be over. But our law recognizes that brutal forces exist in the world today and so the choice of the words "physical persecution" used in the statute. It is not that the lives of these men will be taken, but what their minds and bodies will endure until they will be dispatched. The choice of ruling against these 36 people rather than disclose secret information may be "obvious" to the

Solicitor General. It is obscure to any American who believes in the democratic traditions of our great country.

The petition for certiorari should be granted.

March 13, 1953.

Respectfully submitted,

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